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7 **UNITED STATES DISTRICT COURT**
8 **SOUTHERN DISTRICT OF CALIFORNIA**
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10 VALVOLINE INSTANT OIL CHANGE
11 FRANCHISING, INC.; ASHLAND
12 CONSUMER MARKETS, a commercial
13 unit of ASHLAND, INC.; ASHLAND
14 LICENSING AND INTELLECTUAL
PROPERTY LLC; HENLEY
ENTERPRISES, INC.; HENLEY PACIFIC
LLC; HENLEY PACIFIC LA LLC; and
HENLEY PACIFIC SD LLC,

15 Plaintiffs,

16 vs.

17 RFG OIL, INC.,

18 Defendant,

19 —

20 RFG OIL, INC.,

Counter-Claimant,

21 vs.

22 VALVOLINE INSTANT OIL CHANGE
23 FRANCHISING, INC.; ASHLAND
24 CONSUMER MARKETS, a commercial
unit of ASHLAND, INC.; ASHLAND
LICENSING AND INTELLECTUAL
PROPERTY LLC; HENLEY
ENTERPRISES, INC.; HENLEY PACIFIC
LLC; HENLEY PACIFIC LA LLC; and
HENLEY PACIFIC SD LLC,

27 Counter-Defendants.
28

CASE NO. 12-cv-2079-GPC-KSC

**ORDER GRANTING IN PART
AND DENYING IN PART
COUNTER-DEFENDANTS'
MOTION TO DISMISS RFG'S
COUNTERCLAIM**

[ECF No. 58.]

INTRODUCTION

The instant case was filed by Plaintiffs Valvoline Instant Oil Change Franchising, Inc. (“VIOCF”), Ashland Consumer Markets, a commercial unit of Ashland, Inc. (“Ashland”)¹, Ashland Licensing and Intellectual Property LLC (“ALIP”), Henley Enterprises, Inc., Henley Pacific, LLC, Henley Pacific LA LLC, and Henley Pacific SD LLC (collectively “Plaintiffs”) against Defendant RFG Oil, Inc. (“RFG”) on February 8, 2012 in the United States District Court for the Eastern District of Kentucky, and transferred to this Court on August 22, 2012 pursuant to 28 U.S.C. § 1404(a). (ECF No. 42.) On September 5, 2012, RFG filed a Counterclaim against all Plaintiffs. (ECF No. 47.) Presently before the Court is the Motion of Valvoline Instant Oil Change Franchising, Inc., Ashland Consumer Markets, and Ashland Licensing and Intellectual Property LLC (collectively the “VIOCF Counter-Defendants”) to dismiss five counts of RFG’s Counterclaim: the First Count for breach of contract; the Fourth Count for intentional interference with prospective economic advantage; the Fifth Count for breach of confidence; the Sixth Count for fraudulent misrepresentation; and the Seventh Count for breach of implied covenant of good faith and fair dealing. (ECF No. 58.) Having considered the parties’ submissions and for the reasons set forth below, the Court **GRANTS** the VIOCF Counter-Defendants’ Motion to Dismiss as to Counts One, Five, Six, and Seven, and **DENIES** the VIOCF Counter-Defendants’ Motion to Dismiss as to Count Four.

BACKGROUND²

In 1990, RFG opened its first location as a Valvoline Instant Oil Change franchisee with VIOCF as franchisor. By 2011, RFG owned and operated approximately forty (40) oil change and quick lube centers in and around Southern

¹Ashland is otherwise known as “Valvoline” and does business as “Valvoline Instant Oil Change.”

²The factual information in this section is taken from RFG’s Counterclaim. (ECF No. 47.)

1 California, all of which were Valvoline Instant Oil Change franchises. Each of RFG's
2 franchise locations was governed by a series of License Agreements, Sign and
3 Equipment Leases, and Supply Agreements (collectively referred to as "Valvoline
4 Agreements") that were entered into between RFG and VIOCF, Ashland, and ALIP.

5 Pursuant to each of the License Agreements, VIOCF promised not to grant a
6 license to another Valvoline franchisee within a two mile radius of the store to which
7 the License Agreement pertained. Furthermore, from about 1991 to 1999 VIOCF and
8 RFG entered into a Development Agreement in which "VIOCF granted RFG exclusive
9 rights to all of San Diego County and portions of Los Angeles County." (ECF No. 47
10 ¶ 22.) Although VIOCF did not renew the Development Agreement after 1999,
11 "VIOCF verbally assured RFG that it would continue to have exclusive rights to San
12 Diego County." (Id. ¶ 23.) From 1999 to 2010, VIOCF advised RFG of preliminary
13 discussions with potential franchisees in Southern California, and would not grant
14 franchise licenses to potential franchisees if RFG objected to the location as an
15 encroachment on RFG's territory.

16 In late 2010, RFG acquired 16 new Valvoline franchises for the Southern
17 California market. As part of the transaction, "VIOCF agreed to provide RFG with
18 substantial financial assistance, cash incentives, credits to amounts due VIOCF and
19 Ashland, and commitments for future financial assistance for replacing the signs for
20 the 16 new Valvoline stores." (Id. ¶ 28.) However, RFG alleges "VIOCF failed to
21 provide the promised financial assistance for the new locations and RFG began to
22 experience financial struggles." (Id. ¶ 29.)

23 In late 2010, the Henley defendants,³ another VIOCF franchisee primarily
24 operating on the East Coast, Florida and the Midwest, began communicating an interest
25 to VIOCF about expanding its store locations to Southern California. Specifically,
26 Henley wanted to purchase seventy-two (72) EZ-Lube store locations in Southern
27

28 ³Henley Enterprises, Inc., Henley Pacific LLC, Henley Pacific LA LLC, and
Henley Pacific SD LLC shall be referred to herein as "Henley."

1 California and convert them to Valvoline franchises. At least fourteen (14) of the
2 desired EZ-Lube locations were located within a two mile radius of an RFG Valvoline
3 franchise, which prevented Henley from converting all 72 EZ-Lube locations into
4 Valvoline franchises while the RFG-VIOCF License Agreements were still in force.

5 In late 2010, Henley began negotiating with RFG for the purchase of RFG's
6 Valvoline locations. Henley represented that it wanted to enter into a new venture with
7 RFG, and that as part of this venture RFG would own and operate RFG's locations as
8 well as the 72 EZ-Lube locations. However, RFG alleges Henley never wanted to enter
9 into a new venture with RFG and simply wanted to acquire RFG's locations at the
10 lowest possible cost. Furthermore, RFG alleges "VIOCF conspired with Henley to oust
11 RFG from the Southern California market by wrongfully attempting to terminate RFG's
12 license agreements and withholding VIOCF's normal financial support to its
13 franchisee, RFG" because VIOCF would "greatly benefit" from Henley entering the
14 Southern California market. (Id. ¶ 3.)

15 In January 2011, VIOCF notified RFG of an alleged breach of the Valvoline
16 Agreements, based on RFG's alleged failure to timely pay for products from VIOCF.
17 RFG disputed that it was in breach of the Valvoline Agreements.

18 During the twenty-three (23) years that RFG had been a Valvoline franchisee,
19 RFG had occasionally been unable to pay VIOCF in full pursuant to the terms of the
20 Valvoline Agreements. On each of those prior occasions RFG and Valvoline were able
21 to negotiate extensions, credits, or financing so that VIOCF was ultimately paid in full
22 by RFG. This time, however, VIOCF demanded that RFG commence paying in
23 advance for VIOCF products. In addition, "VIOCF assured RFG that it would not take
24 action on the alleged breaches, as long as RFG continued negotiating with Henley
25 regarding the sale of the RFG locations and RFG continued to pay VIOCF for royalties
26 and product purchases." (Id. ¶ 45.)

27 Subsequently, RFG pre-paid for Valvoline products that were not delivered. In
28 addition, VIOCF "over-charged RFG for products and VIOCF refused to adjust the

1 prices.” (Id. ¶ 46.) This led RFG to purchase Valvoline products from other merchants
2 at retail prices, after it had already pre-paid for a product that was never delivered,
3 resulting in severe financial hardship for RFG in the daily operations of its Valvoline
4 locations.

5 Further, RFG alleges “VIOCF was providing Henley with confidential
6 information regarding RFG’s business operations including, but not limited to, daily
7 car count averages, its average ticket, RFG’s negotiation strategy (which RFG had [sic]
8 previously disclosed to VIOCF in confidence) and RFG’s financial information in
9 order to give Henley an advantage over RFG.” (Id. ¶ 49.)

10 By late 2011, Henley needed to finalize its purchase of the 72 EZ-Lube
11 locations, but Henley could not convert all of these locations to Valvoline franchises
12 because RFG had not transferred its locations to Henley.

13 On November 29, 2011, VIOCF informed RFG that it would “terminate” RFG’s
14 License Agreements effective November 30, 2011. VIOCF told RFG that Ashland
15 demanded immediate payment of over \$14 million and would take immediate action
16 to close RFG’s remaining Valvoline locations, but that if RFG signed a termination
17 agreement and executed a “We Feature Agreement,”⁴ RFG could have a ninety (90) day
18 extension on the closing of the Valvoline stores.

19 RFG was told that it had until December 5, 2011 at noon to execute the
20 documents. RFG had several conversations with VIOCF representatives regarding the
21 agreements and requested modifications, but RFG never executed the final documents.

22 On December 5, 2011, three hours after the noon deadline passed, and not
23 having received the executed agreements from RFG, VIOCF and Ashland presented
24 RFG with a revised Termination Agreement and We Feature Agreement. On December
25 6, 2011, David Gong, one of two shareholders for RFG, executed the Termination
26 agreement and the We Feature Agreement, subject to modifications that Mr. Gong
27

28 ⁴A “We Feature Agreement” allows stores to carry Valvoline products without
being a franchisee.

1 made to the We Feature Agreement. Jeff Gong, the other shareholder of RFG, did not
2 execute either agreement. As a guarantor of the Valvoline Agreements, Jeff Gong's
3 signature was required on the Termination Agreement.

4 On December 6, 2011, "VIOCF and Ashland rejected the modifications made to
5 the We Feature Agreement and demanded that RFG execute an unmodified version."
6 (Id. ¶ 60.) However, from December 6, 2011 to December 14, 2011, VIOCF and
7 Ashland negotiated with RFG over modifications to the We Feature Agreement.

8 On December 14, 2011, Ashland executed the modified We Feature Agreement
9 that it had previously rejected. But on December 16, 2011, "Ashland stated it
10 disagreed with and rejected RFG's modifications and repudiated the document." (Id.
11 ¶ 63.)

12 Thereafter, the parties "maintained the status quo and RFG continued its
13 operations of its locations in the same manner it had for the last 23 years. During this
14 period, RFG and Henley continued their negotiations to form a joint venture or to have
15 Henley acquire RFG's locations." (Id. ¶ 64.)

16 In February 2012, "RFG learned of Henley's impending deal to close on the 72
17 EZ Lube locations and that Henley was now refusing to pay any compensation to RFG
18 to acquire its stores." (Id. ¶ 65.) This information led RFG to believe that Henley had
19 not been negotiating with RFG with the intention of ever purchasing the RFG stores
20 in good faith.

21 On or about February 6, 2012, RFG sent a letter notifying VIOCF, Ashland, and
22 Henley that RFG still considered itself a Valvoline franchisee, and that as such "RFG
23 had substantial rights which would be violated by Henley's acquisition of the EZ Lube
24 Locations." (Id. ¶ 66.)

25 On February 8, 2012, VIOCF, Ashland and Henley filed this action against RFG
26 in the Eastern District of Kentucky, alleging trademark infringement, unfair
27 competition, breach of contract, tortious interference, and breach of implied covenant
28 of good faith and fair dealing. (ECF No. 1.)

1 On September 5, 2012, RFG filed a Counterclaim against all Plaintiffs. (ECF
2 No. 47.) In its Counterclaim, RFG lists ten Counts: (1) breach of contract as to VIOCF,
3 Ashland, and ALIP; (2) declaratory relief as to VIOCF, Ashland, and ALIP that the
4 Valvoline Agreements are enforceable; (3) declaratory relief as to VIOCF, Ashland,
5 and ALIP that the We Feature Agreement was never enforceable; (4) intentional
6 interference with prospective economic advantage as to VIOCF, Ashland, and ALIP;
7 (5) breach of confidence as to VIOCF and Ashland; (6) fraudulent misrepresentation
8 as to VIOCF, Ashland, and ALIP; (7) breach of implied covenant of good faith and fair
9 dealing as to VIOCF, Ashland, and ALIP; (8) misappropriation of trade secret as to
10 VIOCF, Ashland, and ALIP; (9) intentional interference with prospective economic
11 advantage as to Henley; and (10) breach of confidence as to Henley. (Id.)

12 LEGAL STANDARD

13 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the
14 sufficiency of a complaint. Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). “To
15 survive a motion to dismiss, a complaint must contain sufficient factual matter,
16 accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v.
17 Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S.
18 544, 547 (2007)). In reviewing a motion to dismiss under Rule 12(b)(6), the court
19 assumes the truth of all factual allegations and must construe all inferences from them
20 in the light most favorable to the nonmoving party. Thompson v. Davis, 295 F.3d 890,
21 895 (9th Cir. 2002); Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir.
22 1996). Legal conclusions, however, need not be taken as true merely because they are
23 cast in the form of factual allegations. Ileto v. Glock, Inc., 349 F.3d 1191, 1200 (9th
24 Cir. 2003); W. Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). A claim is
25 facially plausible when the factual allegations permit “the court to draw the reasonable
26 inference that the defendant is liable for the misconduct alleged.” Iqbal, 556 U.S. at
27 678.

28 Where a motion to dismiss is granted, “leave to amend should be granted ‘unless

1 the court determines that the allegation of other facts consistent with the challenged
2 pleading could not possibly cure the deficiency.” DeSoto v. Yellow Freight Sys., Inc.,
3 957 F.2d 655, 658 (9th Cir. 1992) (quoting Schreiber Distrib. Co. v. Serv-Well
4 Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986)). In other words, where leave to
5 amend would be futile, the Court may deny leave to amend. See Desoto, 957 F.2d at
6 658.

7 **DISCUSSION**

8 The VIOCF Counter-Defendants move to dismiss five counts of RFG’s
9 Counterclaim: the First Count for breach of contract; the Fourth Count for intentional
10 interference with prospective economic advantage; the Fifth Count for breach of
11 confidence; the Sixth Count for fraudulent misrepresentation; and the Seventh Count
12 for breach of implied covenant of good faith and fair dealing. (ECF No. 58.) For the
13 reasons stated below, the VIOCF Counter-Defendants’ Motion must be granted as to
14 all claims except for RFG’s Fourth Count for intentional interference with prospective
15 economic advantage.

16 **I. Breach of Contract**

17 The VIOCF Counter-Defendants argue that RFG fails to state a claim for breach
18 of contract against the VIOCF Counter-Defendants because “RFG has not properly
19 pled verbatim the material terms of the contract (or attached a copy of the contract)
20 upon which the cause of action against VIOCF Counter-Defendants is based.” (ECF
21 No. 58 at 2:17-24.) RFG argues that RFG is not required by the Federal Rules of Civil
22 Procedure to attach a contract to its complaint, and that attaching the relevant contract
23 for each RFG location involved in this dispute would be overly burdensome and
24 inefficient. (ECF No. 66 at 13:1-22.)

25 To state a claim for breach of contract, a plaintiff must plead the existence of the
26 contract, plaintiff’s performance (or excuse for nonperformance), defendant’s breach,
27 and damage to plaintiff resulting from defendant’s breach. Low v LinkedIn Corp., 900
28 F. Supp. 2d 1010, 1028 (N.D. Cal. 2012) (quoting Gautier v. General Tel. Co., 234 Cal.

1 App. 2d 302, 305 (1965)). Furthermore, “if the action is based on an alleged breach
2 of a written contract, the terms must be set out verbatim in the body of the complaint
3 or a copy of the written instrument must be attached and incorporated by reference.”
4 Otworth v. S. Pac. Transp. Co., 212 Cal. App. 3d 452, 459 (1985).

5 Here, RFG fails to state a claim for breach of contract because RFG has not
6 attached the relevant contract to its complaint or included verbatim the terms RFG
7 alleges were breached by the VIOCF Counter-Defendants. In its Opposition, RFG cites
8 a First Circuit case, Romani v. Shearson Lehman Hutton, 929 F.2d 875, 879 n.3 (1st
9 Cir. 1991), for the proposition that RFG is not required to attach the contract to its
10 counterclaim. (ECF No. 66 at 13.) However, the court in Romani merely addressed
11 whether the defendant in that case could properly introduce documents in a motion to
12 dismiss without converting the motion into one for summary judgment. Romani, 929
13 F.2d at 879 n.3. As the VIOCF Counter-Defendants note in their Reply to RFG’s
14 Opposition, various other District Courts in this state have upheld the rule in Otworth.
15 See, e.g., Ayala v. Bank of America, No. 09cv1946-BTM (NLS), 2010 WL 1568577
16 at *2 (S.D. Cal. Apr. 16, 2010); Yanik v. Countrywide Home Loans, Inc., No. CV 10-
17 6268 CAS(RZx), 2010 WL 4256312 at *4 (E.D. Cal. Oct. 18, 2010).

18 RFG also argues that adhering to the rule in Otworth would be “overly
19 burdensome” and “inefficient.” (ECF No. 66 at 13:18-19.) However, RFG cites no
20 authority for the proposition that an abundance of documents may excuse a party from
21 attaching such documents to its pleading or including the verbatim terms relevant to
22 the party’s claim for breach of contract. RFG’s argument is also unpersuasive because,
23 as RFG itself points out in its Opposition, the contracts between RFG and the VCIOF
24 Counter-Defendants were “virtually identical in most situations.” (ECF No. 66 at
25 13:15.) If the contracts pertaining to the various RFG Valvoline locations are indeed
26 virtually identical, then the terms RFG claims were breached by the VIOCF Counter-
27 Defendants may be the same across all of the contracts, in which case RFG could
28 simply include such terms verbatim in the body of its complaint. Furthermore, the fact

1 that Plaintiffs attached representative contracts to their First Amended Complaint
2 against RFG and identified the relevant provisions RFG allegedly breached lends
3 credence to the VIOCF Counter-Defendants' argument that it would not be overly
4 burdensome for RFG to do the same. (ECF No. 59-1 Ex. A-G.)

5 Because RFG has failed to put the VIOCF Counter-Defendants on notice by
6 specifying the verbatim terms the VIOCF Counter-Defendants allegedly breached or
7 attaching the relevant contracts to its Counterclaim, RFG has not adequately stated a
8 claim for breach of contract against the VIOCF Counter-Defendants.

9 **II. Intentional Interference with Prospective Economic Advantage**

10 The VIOCF Counter-Defendants argue that RFG fails to state a claim for
11 intentional interference with prospective economic advantage because the VIOCF
12 Counter-Defendants "are not strangers or outsiders capable of wrongfully interfering
13 with" the negotiation between RFG and Henley that serves as the basis for RFG's
14 claim, and therefore "are legally privileged to assert their rights with respect to their
15 own franchise." (ECF No. 58 at 2-3.) RFG argues that the argument put forth by the
16 VIOCF Counter-Defendants does not apply to this case because the actions taken by
17 the VIOCF Counter-Defendants "were both wrongful and intended to harm RFG."
18 (ECF No. 66 at 9-10.)

19 A defendant may be liable for intentional interference with prospective economic
20 advantage where plaintiff shows: "(1) an economic relationship between plaintiff and
21 a third party, with the probability of future economic benefit to the plaintiff; (2)
22 defendant's knowledge of the relationship; (3) an intentional act by the defendant,
23 designed to disrupt the relationship; (4) actual disruption of the relationship; and (5)
24 economic harm to the plaintiff proximately caused by the defendant's wrongful act,
25 including an intentional act by the defendant that is designed to disrupt the relationship
26 between the plaintiff and a third party." Edwards v. Arthur Andersen LLP, 44 Cal. 4th
27 937, 944 (2008).

28 However, one who has a financial interest in the business of another may

1 intentionally cause the other not to enter into a contractual relation with a third party
2 without being held liable for intentional interference with prospective economic
3 advantage as long as the actor “does not employ wrongful means” and “acts to protect
4 his interest from being prejudiced by the relation.” Hamro v. Shell Oil Co., 674 F.2d
5 784, 789-90 (9th Cir. 1982) (quoting Restatement (Second) of Torts § 769 (1979)).
6 The type of financial interest privileged by this rule is ““an interest in the nature of an
7 investment,’ such as that of a part owner, a partner or a stockholder.” Id. at 790
8 (quoting Restatement (Second) of Torts § 769 cmt. c). Because privilege is an
9 affirmative defense which defendants have the burden of proving, Robinson v. State
10 Farm Ins., C 94 3304 TEH, 1996 WL 31850 at *3 (N.D. Cal. Jan. 16, 1996), and the
11 issue of whether a defendant employed wrongful means or acted to harm the plaintiff
12 often turns on the defendant’s state of mind, the existence of the privilege “cannot
13 normally be satisfactorily determined on the basis of pleadings alone.” Sade Shoe Co.
14 v. Oschin & Snyder, 162 Cal. App. 3d 1174, 1181 (1984) (quoting Culcal Stylco, Inc.
15 v. Vornado, Inc., 26 Cal. App. 3d 879, 883 (1972)).

16 Here, the VIOCF Counter-Defendants do not dispute that RFG has pled facts
17 sufficient to state a prima facie claim for intentional interference with prospective
18 economic advantage, but rather argue that RFG fails to state a claim because the
19 VIOCF Counter-Defendants’ actions were privileged. (ECF Nos. 58, 67.) Because
20 privilege is an affirmative defense and the issue of whether the VIOCF Counter-
21 Defendants acted to cause harm to RFG depends on the VIOCF Counter-Defendants’
22 motive, it would be inappropriate for the Court to decide the issue at this stage in the
23 litigation. Thus, the VIOCF Counter-Defendant’s motion to dismiss RFG’s
24 counterclaim must be denied as it pertains to RFG’s cause of action for intentional
25 interference with prospective economic advantage.

26 **III. Breach of Confidence**

27 The VIOCF Counter-Defendants argue that RFG fails to state a claim for breach
28 of confidence as to the VIOCF Counter-Defendants because “RFG’s breach of

1 confidence claim is based on the same nucleus of facts as RFG's claim for
2 misappropriation of trade secrets" and is thus preempted by the California Uniform
3 Trade Secrets Act ("CUTSA"). (ECF No. 58-1 at 9-10.) RFG argues that the claims
4 for breach of confidence and misappropriation of trade secrets are not based on the
5 same nucleus of facts because the breach of confidence claim involves not only the
6 alleged disclosure of confidential customer lists but also the alleged disclosure of
7 financial information. (ECF No. 66 at 11.)

8 The CUTSA does not affect "civil remedies that are not based upon
9 misappropriation of a trade secret." Cal. Civ. Code § 3426.7. Under California law,
10 this means that the CUTSA does supersede other civil remedies to the extent that a
11 party's claim for relief is based on the same nucleus of facts as a claim for
12 misappropriation of trade secrets. K.C. Multimedia, Inc. v. Bank of Am. Tech. &
13 Operations, Inc., 171 Cal. App. 4th 939, 958 (2009); Digital Envoy, Inc. v. Google,
14 Inc., 370 F. Supp. 2d 1025, 1035 (N.D. Cal. 2005). Furthermore, the CUTSA
15 supersedes other civil remedies where the claim for relief is based on the
16 misappropriation of confidential or proprietary information, even if such information
17 fails to qualify as a trade secret under the CUTSA. SunPower Corp. v. SolarCity Corp.,
18 12-CV-00694-LHK, 2012 WL 6160472 at *7 (N.D. Cal. Dec. 11, 2012); Silvaco Data
19 Sys. v. Intel Corp., 184 Cal. App. 4th 210, 239 n.22 (2010) (disapproved of on other
20 grounds by Kwikset Corp. v. Superior Court, 51 Cal. 4th 310 (2011)). Although a
21 displacement provision contained in the Model Uniform Trade Secrets Act ("MUTSA")
22 may allow plaintiffs in other jurisdictions to maintain separate causes of action where
23 a claim for relief includes other factual allegations in addition to misuse or
24 misappropriation of trade secrets, "California has rejected that particular provision of
25 the uniform act in favor of an entirely different one." K.C. Multimedia, 171 Cal. App.
26 4th at 956-59 (rejecting a "narrow interpretation of preemption" with respect to the
27 CUTSA and holding that plaintiff's claims for breach of confidence, interference with
28 contract, and unfair competition were preempted by the CUTSA despite added factual

1 allegations in those claims).

2 Here, RFG's cause of action for breach of confidence as to the VIOCF Counter-
3 Defendants is based on the allegation that the VIOCF Counter-Defendants provided
4 Henley with RFG's confidential customer lists, as well as financial performance
5 information for each of RFG's locations, in an attempt to oust RFG from the Southern
6 California market. (ECF No. 47 at 11-12.) RFG's claim for misappropriation of trade
7 secrets, meanwhile, is based solely on the VIOCF Counter-Defendants' alleged
8 disclosure to Henley of RFG's confidential customer lists. (Id. at 13 ¶ 109.) However,
9 given that the California legislature rejected an approach to the MUTSA that would
10 allow RFG to maintain separate causes of action in this type of situation, the added
11 factual allegations in RFG's breach of confidence cause of action are insufficient to
12 differentiate it from RFG's claim of misappropriation of trade secrets and thus both
13 claims are based on the same nucleus of facts.⁵ Therefore, RFG's claim for breach of
14 confidence as to the VIOCF Counter-Defendants is preempted by the CUTSA and must
15 be dismissed.

16 **IV. Fraudulent Misrepresentation**

17 The VIOCF Counter-Defendants argue that RFG fails to state a claim for
18 fraudulent misrepresentation (1) because RFG's claim is improperly based upon
19 alleged promises concerning future actions rather than statements involving past or
20 existing facts, and (2) because RFG fails to "put the VIOCF [Counter-]Defendants on
21 notice as to who allegedly made [fraudulent] representations to RFG, or under what
22 authority that individual (or individuals) purported to speak (or write)." (ECF No. 58-1
23 at 10-11.) RFG argues that allegedly fraudulent statements made to RFG about what
24 VIOCF intended to do constitute representations of existing facts sufficient to state a
25

26 ⁵Even if RFG's cause of action for breach of confidence rested solely upon the
27 alleged misappropriation of financial information, RFG would still fail to state a claim.
28 Although such financial information may not classify as a trade secret under the
CUTSA, it is confidential information and thus RFG's breach of confidence cause of
action would be preempted by the CUTSA.

1 claim for fraudulent misrepresentation, and that RFG's allegations are specific enough
2 to survive a motion to dismiss. (ECF No. 66 at 12.)

3 To state a claim for fraudulent misrepresentation, RFG must allege (1) the
4 VIOCF Counter-Defendants made a false representation of fact; (2) the VIOCF
5 Counter-Defendants knew the representation was false at the time of the representation;
6 (3) the VIOCF Counter-Defendants intended that RFG would rely on the
7 representation; (4) RFG reasonably relied on the representation; and (5) RFG suffered
8 damages as a result of the false representation. 5 Witkin, Summary of Cal. Law (10th
9 ed. 2005) Torts, § 772, p. 1121; Engalla v. Permanente Medical Group, Inc., 15 Cal.
10 4th 951, 974 (1997); Hunter v. Up-Right, Inc., 6 Cal. 4th 1174, 1184 (1993).

11 Furthermore, "[f]raudulent representations, to constitute ground for relief, must
12 be as to existing and material facts; predictions of future events are ordinarily
13 considered non-actionable expressions of opinion." Richard P. v. Vista Del Mar Child
14 Care Serv., 106 Cal. App. 3d 860, 865 (1980). However, "while fraud requires the
15 intentional misrepresentation of a fact, the speaker's intention may constitute a fact for
16 this purpose." Yield Dynamics, Inc. v. TEA Sys. Corp., 154 Cal. App. 4th 547, 575
17 (2007). Thus, where a promise is made without the intention to perform "there is an
18 implied misrepresentation of fact that may be actionable fraud." Lazar v. Superior
19 Court, 12 Cal. 4th 631, 638 (1996); see also 5 Witkin, Summary of Cal. Law (10th ed.
20 2005) Torts, § 781, p. 1131 ("A statement of what the defendant or some third person
21 intends to do relates to an existing state of mind, and is a representation of fact.").

22 In addition, "[e]very element of the cause of action for fraud must be alleged in
23 the proper manner and the facts constituting the fraud must be alleged with sufficient
24 specificity to allow defendant to understand fully the nature of the charge made."
25 Tarmann v. State Farm Mut. Auto. Ins. Co., 2 Cal. App. 4th 153, 157 (1991) (quoting
26 Roberts v. Ball, Hunt, Hart, Brown & Baerwitz, 57 Cal. App. 3d 104, 109 (1976)).
27 Where a fraud action is being maintained against a corporation, a claimant must "allege
28 the names of the persons who made the allegedly fraudulent representations, their

1 authority to speak, to whom they spoke, what they said or wrote, and when it was said
2 or written.” Id.

3 Here, RFG alleges the VIOCF Counter-Defendants made a false representation
4 when they “assured RFG that it would not take on RFG’s alleged breaches of the
5 Valvoline Agreements, as long as RFG continued negotiating with Henley regarding
6 the sale of the RFG locations and RFG began to pre-pay for its products.” (ECF No.
7 47 ¶95.) Such assurances, as false representations of the VIOCF Counter-Defendants’
8 intention to perform on a promise, would constitute misrepresentations of fact
9 sufficient to state a claim for fraud. However, RFG has failed to state a claim for
10 fraudulent misrepresentation because RFG’s allegations lack the specificity required
11 in a fraud action against a corporation. RFG does not provide the names of the persons
12 who made the allegedly fraudulent misrepresentations, their authority to speak, to
13 whom they spoke, what they said or wrote, or when it was said or written. Thus, the
14 VIOCF Counter-Defendants’ motion to dismiss must be granted with respect to RFG’s
15 claim for fraudulent misrepresentation.

16 **V. Breach of Implied Covenant of Good Faith and Fair Dealing**

17 The VIOCF Counter-Defendants argue that RFG fails to state a claim for breach
18 of implied covenant of good faith and fair dealing because (1) the claim is superfluous
19 and improper in that it “does not go beyond the statement of a breach of express
20 contractual terms and seeks the same relief sought in a breach of contract claim” and
21 (2) the claim is improper because “there is no recognized cause of action for tortious
22 breach of contract outside of the insurance context.” (ECF No. 58 at 3-4.) RFG argues
23 that the claim for breach of implied covenant of good faith and fair dealing is not
24 superfluous, and that although “courts generally enforce this breach *via* contract law,
25 and not with the imposition of tort remedies, RFG is still entitled to bring the claim.”
26 (ECF No. 66 at 10.)

27 “Every contract imposes on each party a duty of good faith and fair dealing in
28 its performance and its enforcement.” Jonathan Neil & Associates, Inc. v. Jones, 33

1 Cal. 4th 917, 937 (2004) (quoting Restatement (Second) of Contracts § 205 (1981)).
2 However, if a plaintiff's allegations of a breach of such duty "do not go beyond the
3 statement of a mere contract breach and, relying on the same alleged acts, simply seek
4 the same damages or other relief already claimed in a companion contract cause of
5 action, they may be disregarded as superfluous as no additional claim is actually
6 stated." Careau & Co. v. Sec. Pac. Bus. Credit, Inc., 222 Cal. App. 3d 1371, 1395
7 (1990). Thus, where a plaintiff has alleged both breach of contract and breach of
8 implied covenant of good faith and fair dealing, "the only justification for asserting a
9 separate cause of action for breach of the implied covenant is to obtain a tort recovery."
10 Id.

11 Although "in insurance cases there is a well-developed history recognizing a tort
12 remedy for a breach of the implied covenant," such recognition is dependent on the
13 existence of a "special relationship" between the insurer and the insured and "has little
14 authoritative support" outside of the insurance context. Id. at 1395-99 (holding that
15 plaintiff could not recover in tort for breach of implied covenant of good faith and fair
16 dealing in a case arising out of "a rather common commercial banking transaction").
17 For a plaintiff to recover tort damages for breach of implied covenant of good faith and
18 fair dealing outside of the insurance context, "'(1) the contract must be such that the
19 parties are in inherently unequal bargaining positions; (2) the motivation for entering
20 the contract must be a nonprofit motivation, i.e., to secure peace of mind, security,
21 future protection; (3) ordinary contract damages are not adequate, because (a) they do
22 not require the party in the superior position to account for its actions, and (b) they do
23 not make the inferior party 'whole'; (4) one party is especially vulnerable because of the
24 type of harm it may suffer and of necessity places trust in the other party to perform;
25 and (5) the other party is aware of this vulnerability.'" Id. at 1398 (quoting Wallis v.
26 Superior Court, 160 Cal. App. 3d 1109, 1118 (1984)). The relationship between
27 franchisor and franchisee has been held insufficient to support the recovery of tort
28 damages for breach of the implied covenant. Little Oil Co., Inc. v. Atl. Richfield Co.,

1 852 F.2d 441, 447 (9th Cir. 1988).

2 Here, RFG merely states the VIOCF Counter-Defendants breached the implied
3 covenant of good faith and fair dealing “[b]y virtue of its bad faith conduct.” (ECF No.
4 47 ¶ 104.) Such a statement is insufficient to demonstrate that RFG relies on more than
5 mere contract breach as the factual basis for its claim. As far as damages, RFG seeks
6 in both causes of action “an amount in excess of \$10,000,000.00 to be determined at
7 trial.” (*Id.* ¶¶ 71, 105.) Because RFG’s allegations do not go beyond a mere statement
8 of contract breach and RFG seeks the exact same damages as in its cause of action for
9 breach of contract, RFG’s claim for breach of implied covenant of good faith and fair
10 dealing is superfluous and must be dismissed.

11 Furthermore, the relationship between RFG and the VIOCF Counter-Defendants
12 is not the type that would support the availability of tort remedies for breach of the
13 implied covenant. As a franchisee, RFG’s motivation for entering into a contract was
14 profit, rather than the peace of mind and security that motivates people to enter into
15 insurance contracts. RFG has not given any reasons why ordinary contract damages
16 would be inadequate in this case, or why RFG was in a special position of
17 vulnerability.

18 RFG’s claim for breach of implied covenant of good faith and fair dealing is
19 superfluous to its claim for breach of contract, and the relationship between RFG and
20 the VIOCF Counter-Defendants does not support the recovery of tort damages in this
21 case. Thus, RFG’s cause of action for breach of the implied covenant must be
22 dismissed.

23 CONCLUSION

24 For the reasons set forth above, the VIOCF Counter-Defendants’ Motion to
25 Dismiss RFG’s Counterclaim is **GRANTED** as to the First Count for breach of
26 contract, Fifth Count for breach of confidence, Sixth Count for fraudulent
27 misrepresentation, and Seventh Count for breach of implied covenant of good faith and
28 fair dealing. The VIOCF Counter-Defendants’ Motion is **DENIED** as to RFG’s Fourth

1 Count for intentional interference with prospective economic advantage. RFG is
2 granted leave to file an amended counterclaim no later than 20 days from the date this
3 order is filed.

4 **IT IS SO ORDERED.**

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6 DATED: August 5, 2013

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8 HON. GONZALO P. CURIEL
9 United States District Judge
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